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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT M. GROOMS, Petitioner,	)	
v.	)	No.
C. WHITNEY SLABAUGH, MICHAEL A. COSENTINO, R. TERRY SNYDER, and DAVID PETGEN, Respondents.	)	

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

Petitioner Robert M. Grooms, by his attorneys, Jerold S. Solovy, James A. McKenna, and Jenner & Block, respectfully moves this Court for leave to file his Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, without prepayment of fees and costs or security therefore, and to proceed in forma pauperis.

In support of this Motion, petitioner states:

1. This Petition for Certiorari is taken from a decision of the Court of Appeals for the Seventh Circuit. The Seventh Circuit appointed the above-named counsel to represent petitioner in the proceedings below.

2. Petitioner is incarcerated at the Indiana State Prison, Michigan City, Indiana. Petitioner will submit an affidavit in support of this Motion in the near future.

3. Petitioner's counsel believe that petitioner is entitled to proceed in forma pauperis, pursuant to 28 U.S.C. § 1915, and file this Motion in the good faith belief that it will be granted.

WHEREFORE, petitioner Robert M. Grooms respectfully requests that he be given leave to proceed in forma pauperis in this matter.

Jerold S. Solovy
One of the Attorneys
for Petitioner
Robert M. Grooms

JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

file Groom

80-6073

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AFFIDAVIT OF PETITIONER IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, Robert M. Grooms, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees and costs or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to redress; and that the issues which I desire to present in this proceeding are those set forth in the Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit, previously filed in this proceeding.

I further state that I am incarcerated in the Indiana State Prison in Michigan City, Indiana. I understand that a false statement in this affidavit will subject me to penalties of perjury.

R M Grooms

Robert M. Grooms
Petitioner

SUBSCRIBED AND SWORN to before me this 14 day of Jan., 1981.

Richard L. Lowande
Notary Public

Commission Ex 12/23/81

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80-6073

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERT M. GROOMS,

Petitioner,

vs.

C. WHITNEY SLABAUGH,
MICHAEL A. COSENTINO,
R. TERRY SNYDER, and
DAVID PETGEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Jerold S. Solovy
James A. McKenna
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

Of Counsel:

JENNER & BLOCK

QUESTIONS PRESENTED

1) Whether a prosecutor is entitled to absolute immunity under Section 1983, Title 42, United States Code, for investigative and administrative acts unrelated to his adversarial duties and not involving the exercise of any prosecutorial discretion.

2) Whether a police officer is entitled to good faith immunity from Section 1983 liability, as a matter of law and contrary to a jury finding of bad faith, for unconstitutional conduct performed in violation of well established state law.

3) Whether the availability of good faith immunity, under the subjective standard of Section 1983, is a question of fact, and whether the court below erred in substituting its judgment for the findings of the jury.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
I. A PROSECUTOR IS NOT ENTITLED TO ABSOLUTE IMMUNITY FOR ACTS UNDERTAKEN IN HIS INVESTIGATIVE AND ADMINISTRATIVE CAPACITIES, WHICH DO NOT INVOLVE THE EXERCISE OF ANY PROSECUTORIAL DISCRETION	7
II. VIOLATIONS OF WELL ESTABLISHED STATE LAW BY SNYDER AND PETGEN PRECLUDE A RULING THAT, AS A MATTER OF LAW, THEY ACTED IN GOOD FAITH, UNDER AN OBJECTIVE STANDARD	9
III. THE AVAILABILITY OF GOOD FAITH IMMUNITY, UNDER A SUBJECTIVE TEST, IS A QUESTION OF FACT UPON WHICH DEFENDANTS HAVE THE BURDEN OF PROOF, AND THE COURT OF APPEALS ERRED BY SUBSTITUTING ITS JUDGMENT FOR THE VERDICT OF THE JURY	12
IV. THIS CASE PRESENTS IMPORTANT ISSUES ON THE VIABILITY OF PRIVATE ACTIONS TO REDRESS FOURTH AMENDMENT AND OTHER CONSTITUTIONAL VIOLATIONS	14
CONCLUSION	15

TABLE OF AUTHORITIES

Cases	PAGE
Basham v. Pennsylvania R.R., 372 U.S. 699 (1963).....	14
Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).....	14
Dommer v. Hatcher, 427 F. Supp. 1040 (N.D. Ind. 1975).....	10
Donovan v. Reinbold, 433 F.2d 738 (9th Cir. 1970).....	8, 10
Gerstein v. Pugh, 420 U.S. 103 (1975).....	5, 8
Gomez v. Toledo, 100 S. Ct. 1920 (1980).....	12
Haines v. Kerner, 404 U.S. 519 (1972).....	7
Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), cert. denied in relevant part, 100 S. Ct. 1987 (1980).....	7
Harness v. Steele, 64 N.E. 875 (Ind. Sup. Ct. 1902).....	10
Imbler v. Pachtman, 424 U.S. 409 (1976).....	6, 7-8, 13
Matovina v. Hult, 123 N.E.2d 893 (Ind. Ct. App. 1955).....	10
McCray v. Burrell, 516 F.2d 357 (4th Cir. 1975) (in banc), cert. denied, 426 U.S. 471 (1976).....	12
Nacoff v. State, 267 N.E.2d 165 (Ind. Sup. Ct. 1971).....	10
O'Connor v. Donaldson, 422 U.S. 563 (1975).....	9
Scheuer v. Rhodes, 416 U.S. 232 (1974).....	13
Stone v. Powell, 428 U.S. 465 (1976).....	14
Watts v. Indiana, 338 U.S. 49 (1949).....	10
Williams v. State, 348 N.E.2d 623 (Ind. Sup. Ct. 1976).....	10, 11
Wood v. Strickland, 420 U.S. 308 (1975).....	9, 12

Constitutional Provisions and Statutes

U.S. Const. amend. IV..... passim

U.S. Const. amend. XIV..... passim

42 U.S.C. § 1983..... passim

Ind. Code § 18-1-11-8..... 11

Ind. Code § 35-1-21-1..... 11

Ind. Code § 35-4-1-1..... 11

Petitioner Robert M. Grooms respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit entered in these proceedings on August 6, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals, and the Court's denial of Grooms's Petition for Rehearing and Suggestion of Rehearing In Banc, are unreported and appear in the appendix hereto. (App. 1-13.) The opinions of the United States District Court for the Northern District of Indiana are also unreported and contained in the Appendix hereto. (App. 14-20.)

JURISDICTION

The Court of Appeals denied Groom's timely filed Petition for Rehearing and Suggestion of Rehearing In Banc on September 30, 1980. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to Section 1254(1) of Title 28, United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

United States Code, Title 42, Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities

secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Indiana Code, Section 35-4-1-1:

Preliminary charge -- Procedure -- Commitment form -- Bail. -- Whenever any law-enforcement officer shall have arrested and taken into custody any person reasonably believed to have committed a felony and said detained person(s) offers or advances any explanation, justification, alibi or excuse, or circumstances exist which might or could negative the presence at or participation in said crime by such person under detention and said officer nevertheless because of reliable information or investigation still verily believes that such detained person is involved in a commission of the felony, there is hereby created an additional and alternative pleading and procedure to the criminal statutes of the state which shall be known as the preliminary charge, and which may be filed against any arrested and detained person under such circumstances.

When any person is so held and detained under such preliminary charge the law-enforcement officers shall forthwith take such person before the magistrate, justice, municipal, city, criminal or circuit judge, and shall cause to be prepared forthwith before the court hearing such matters, and if said court be not in session then for the next session of the court having jurisdiction in such matters, an information entitled preliminary charge of _____ (naming the felony involved) and said person so accused shall be entitled to a hearing thereon.

Said information shall otherwise follow the form of information now or hereafter prescribed by statute for the felony on which the preliminary charge is filed, but may be in summary form, and the person so detained under said charge shall at said hearing be apprised of the facts concerning the felony with which he or she is charged, and said court shall apprise said person as to whom is accusing him, shall likewise advise said detained person that anything he may say may be used against him and shall also advise said person that he is entitled to legal counsel. Thereafter said person so charged shall after hearing the accusation against said detained person and any explanation offered by said detained person be permitted to give any explanation, or offer any answer thereto. The court shall thereupon rule in discharge or commitment. If the court should find that the person so

held under a preliminary charge should be committed, an order shall issue directed to the county sheriff, the superintendent or chief of police, the marshal, constable or other chief law-enforcement officer ordering the holding and detention of any such person, committing said person for a period not exceeding seven (7) days from the date of said commitment. Said commitment shall be in the following form.

STATE OF INDIANA IN _____ COURT
COUNTY OF _____
To the Sheriff of _____ County. To the Marshal of _____. To the Chief or Superintendent of Police of _____. To the Constable of _____ Township. _____ having been brought before me on the day of _____ at ____ o'clock __M., at which time you shall produce said person before me in open court and if the said person be not charged with _____ on or before said date said person will at said time be discharged.

_____
Judge

Any person so committed on any such preliminary charge shall be entitled to bail upon providing sufficient surety in the amount hereafter provided by statute for the felony concerning which the committed person is preliminarily charged, and if at the expiration of the commitment period no formal charge of felony is placed, said committed person shall be discharged, but otherwise shall stand trial if information or indictment be filed against said person. [Acts 1949, ch. 273, § 1, p. 996; 1974, P.L. 143, § 33, p. 604.]

Indiana Code, Section 35-1-21-1:

Arrests by law-enforcement officers and judges authorized. -- All judges, coroners, and law-enforcement officers may arrest and detain any person found violating any statute of this state, until a legal warrant can be obtained. [Acts 1905, ch. 169, § 142, p. 584; 1978, P.L. 2, §3514, p. 2.]

STATEMENT OF THE CASE

On December 2, 1974, Robert M. Grooms was arrested without a warrant. For ten days after Grooms's arrest, he was incarcerated in Elkhart County Jail without any judicial hearing to determine probable cause or to set bond. For the first two and one-half days, he was held incommunicado despite repeated requests to make a telephone call. During that period, Grooms's locked pickup truck was seized and searched thoroughly; a warrant was neither sought nor obtained for that search and seizure.

On July 25, 1976, Robert Grooms filed this pro se Section 1983 action, complaining that his ten day imprisonment and the warrantless search and seizure of his vehicle violated his Fourth and Fourteenth Amendment rights. Grooms's amended complaint named four defendants: C. Whitney Slabaugh, Prosecuting Attorney of Elkhart County, Indiana; Michael A. Cosentino, Deputy Prosecuting Attorney of Elkhart County; R. Terry Snyder, a detective lieutenant in the Elkhart County Sheriff's Department; and David J. Petgen, an Indiana State Policeman. The district court denied Grooms's motions for appointment of counsel.

The district court dismissed defendants Slabaugh and Cosentino from the lawsuit, holding that they were absolutely immune from liability. The case proceeded to trial before a jury against defendants Snyder and Petgen. Grooms represented himself, assisted by another prisoner who acted as a lay advisor.

At the end of a three-day trial, the court instructed the jury of the elements of plaintiff's case and the officer's defense, including defendants' proferred instruction on the good faith defense. The jury returned a verdict in favor of Grooms. The jury assessed damages

against Snyder in the amounts of $2,500 compensatory damages and $5,000 punitive damages. The jury assessed damages against Petgen in the amounts of $1,250 compensatory and $2,500 punitive. The trial court denied defendants' alternative motions for judgment n.o.v. or for a new trial.

Three appeals were taken to the Court of Appeals for the Seventh Circuit: Grooms appealed the dismissal of Slabaugh and Cosentino as parties defendant (No. 79-1453), and defendants Petgen and Snyder each appealed from the jury verdict and judgment entered theron. (Nos. 79-1536, 79-1537.) In its unpublished per curiam order of August 6, 1980, the Seventh Circuit, with one judge dissenting, reversed the judgment entered on the jury verdicts against police officers Petgen and Snyder, holding that as a matter of law these defendants were entitled to good faith immunity from liability for Grooms's illegal confinement. The panel majority held that Grooms's constitutional right to a prompt probable cause hearing was not clearly established prior to Gerstein v. Pugh, 420 U.S. 103 (1975), and that any violations of state law by defendants were relevant only to "the character of defendants' motives." (App. 9.) The court found as a matter of law that defendants acted in good faith. (App. 10.) In addition, the majority ruled that the police officer defendants were not personally liable for the illegal search and seizure of Grooms's pickup truck.

In addition, the Seventh Circuit, again with one judge dissenting, affirmed the dismissal of the prosecutor defendants Slabaugh and Cosentino. The majority held that defendants' failure to afford Grooms a preliminary hearing was sufficiently prosecutorial in nature to warrant absolute immunity. The court rejected Grooms's contentions that defendants' conduct was an integral part of the investigation

against him (App. 6), and that the duty to provide a judicial hearing was essentially ministerial and administrative. (App. 7-8.)

Judge Cudahy dissented from each of the majority's holdings. Judge Cudahy criticized the court's "captious focus on a pro se complaint" and its extension of Imbler v. Pachtman, 424 U.S. 409 (1976), to the facts of this case: "It is difficult for me to see why a prosecutor is acting as an 'advocate for the State' or 'an officer of the court' (424 U.S. 430 n.33) when he defers a probable cause hearing for ten days." (App. 13.) Judge Cudahy also dissented from the majority's reversal of the jury verdicts, noting that "this sort of case is precisely why we have juries." (App. 13.)

On August 20, 1980, Grooms filed a timely Petition for Rehearing and Suggestion of Rehearing In Banc. The full Seventh Circuit denied the Petition on September 30, 1980. Three members of the Court of Appeals -- Chief Judge Fairchild and Judges Swygert and Cudahy -- dissented and voted to rehear the case in banc.

REASONS FOR GRANTING THE WRIT

This case raises issues of substantial concern to litigants seeking to vindicate constitutional rights through Section 1983 damages actions against individuals. First, the Seventh Circuit's decision expands the ambit of absolute prosecutorial immunity to include investigative and administrative acts unrelated to a prosecutor's adversarial duties and not involving the exercise of any prosecutorial discretion. Second, the majority's decision, in the face of a jury verdict to the contrary, awards good faith immunity to police officers for acts which violated well established state law.

I.

A PROSECUTOR IS NOT ENTITLED TO ABSOLUTE IMMUNITY FOR ACTS UNDERTAKEN IN HIS INVESTIGATIVE AND ADMINISTRATIVE CAPACITIES, WHICH DO NOT INVOLVE THE EXERCISE OF ANY PROSECUTORIAL DISCRETION.

The court below affirmed the dismissal of the prosecutors, Slabaugh and Cosentino, as parties defendant, and in so doing, the majority erroneously extended the absolute, quasi-judicial immunity of Imbler v. Pachtman, 424 U.S. 409 (1976), to conduct far removed from defendants' adversarial duties. When they knowingly kept Grooms confined for ten days without a judicial hearing, defendants were not functioning as advocates for the State or as officers of the Court, and they were not exercising any prosecutorial discretion. The majority's extension of Imbler immunity to essentially investigative and administrative acts protects a wide array of unconstitutional conduct, however heinous, under the guise of immunity, and it presents a serious threat to Section 1983 damages actions.

Grooms's pro se complaint, properly construed under the liberal standards of Haines v. Kerner, 404 U.S. 519 (1972), charges that his illegal detention was an integral part of the overall illegal investigative effort in which defendants were engaged. (Amended Complaint, Count I, ¶ 5.) Part of this investigation consisted of repeated interrogation of Grooms, while defendants held him incommunicado without a judicial hearing. (Transcript of Trial ("Tr.") 65, 88.) In addition, during this time, and facilitated by Grooms's confinement, defendant Cosentino was actively gathering evidence himself. (Tr. 223, 238.) Grooms's complaint challenges this investigative conduct, which should not be entitled to absolute immunity. See Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976); Hampton v.

Hanrahan, 600 F.2d 600 (7th Cir. 1979), cert. denied in relevant part, 100 S. Ct. 1987 (1980).

Moreover, in confining Grooms without a judicial hearing, Slabaugh and Cosentino were functioning as legal advisors to the police, as well as part of an investigative team. As legal advisors performing an essentially administrative duty, they are no more entitled to absolute quasi-judicial immunity than are the police themselves. See Donovan v. Reinbold, 433 F.2d 738, 744 (9th Cir. 1970). Defendants' duty to afford Grooms a prompt hearing was wholly ministerial, and did not require the exercise of any prosecutorial discretion, the protection of which underlies this Court's opinion in Imbler, supra. See 424 U.S. at 423, 424, 426, 431 n.33, 432 n.34.*/ As Judge Cudahy of the Seventh Circuit noted in dissent, there is nothing in Imbler "which even remotely suggests that absolute immunity for prosecutors would be unavailable only in such matters as hiring and firing decisions (as the majority suggests)." (App. 13.)

The Seventh Circuit's erroneous grant of immunity presents an important issue with far ranging consequences for civil rights actions. Unless it is reversed, the decision below will immunize a wide variety of unconstitutional conduct from redress under Section 1983. The serious threat to the protection of constitutional rights posed by the majority's decision warrants review by this Court.

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*/ Judge Cudahy recognized that a prosecutor does not act as an "advocate for the State" or "an officer of the court," Imbler, supra, 424 U.S. at 430 n.33, "when he defers a probable cause hearing for ten days." (App. 13.) In response, the panel majority conceded that the effect of Gerstein v. Pugh, 420 U.S. 103 (1975) "may be to sever the decision to schedule a preliminary hearing from the more discretionary decisions regarding the charges to be filed and evidence presented." (App. 7.) Gerstein did have this effect, but for decades prior to Gerstein, Indiana law had already required that persons arrested without a warrant be given a prompt preliminary hearing (see pp. 10-11, infra). The majority completely ignored the state of Indiana law existing at the time the actions complained of occurred.

II.

VIOLATIONS OF WELL ESTABLISHED STATE LAW BY SNYDER AND PETGEN PRECLUDE A RULING THAT, AS A MATTER OF LAW, THEY ACTED IN GOOD FAITH, UNDER AN OBJECTIVE STANDARD.

Despite clear violations of state law by police officers Snyder and Petgen, and despite a jury finding of bad faith, the majority of the panel below ruled that, as a matter of law, defendants acted in good faith. The majority reached this result by overlooking most of defendants' state law violations; by misapprehending the significance of the state law violations they did consider; and by ignoring the jury verdict in Grooms's favor because the court considered his proof to be "not compelling." This erroneous decision presents an important question regarding the good faith immunity exception to protection afforded by Section 1983.

Public officials who violate the constitutional rights of individuals must satisfy both objective and subjective standards of good faith in order to claim the protection of the qualified immunity available in Section 1983 actions. Wood v. Strickland, 420 U.S. 308, 321 (1975). A good faith immunity promotes important policies: the qualified immunity afforded to Section 1983 defendants "must be such that . . . officials understand that actions taken in the good-faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." Id. Where unconstitutional conduct also violates state law, the concerns expressed in Wood, supra, and the policy reasons which underlie the judicially fashioned immunity exception have no application. Just as reliance on state law may establish good faith, O'Connor v. Donaldson, 422 U.S. 563, 577 (1975), so does a violation of clearly established state law negate a claim to good faith immunity.

See also Donovan v. Reinbold, 433 F.2d 738, 744 (9th Cir. 1970).

In confining Grooms for ten days without a judicial hearing, defendants Snyder and Petgen violated well established principles of Indiana statutory, decisional, and constitutional law. As early as 1902, for example, the Indiana Supreme Court held that, although a police officer could arrest a felony suspect without an arrest warrant,

> [h]e cannot legally hold the person arrested in custody for a longer period of time than is reasonably necessary, under all the circumstances of the case, to obtain a proper warrant or order for his further detention from some tribunal or officer authorized under the law to issue such a warrant or order.

Harness v. Steele, 64 N.E. 875, 878 (1902). Since Harness, the requirements of Indiana law have been unequivocal: "Detention beyond a reasonable period necessary to bring a suspect before a magistrate is illegal." Williams v. State, 348 N.E.2d 623, 629 (Sup. Ct. 1976). Accord, Watts v. Indiana, 338 U.S. 49, 53 (1949);*/ Nacoff v. State, 267 N.E.2d 165, 168 (Sup. Ct. 1971); Matovina v. Hult, 123 N.E.2d 893, 896-97 (Ct. App. 1955) (in banc); Dommer v. Hatcher, 427 F.Supp. 1040, 1043-45 (N.D. Ind. 1975). Defendants' claims of good faith, which were rejected by the jury, sound hollow in the face of their utter disregard and flagrant violation of decades of Indiana law.

The majority completely ignored Indiana case law and focused instead on only one of several relevant Indiana statutes. See Nacoff v. State, 267 N.E.2d 165, 168 (Ind. Sup. Ct. 1971) (Indiana Supreme Court holds that defendant

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*/ The defendant in Watts, supra, was arrested without a warrant and held for six days without a preliminary hearing. In the course of its opinion, holding that the use of defendant's confession violated due process, this Court noted that "the law of Indiana required that petitioner be given a prompt preliminary hearing before a magistrate." 338 U.S. at 53.

held for four and one-half days "was not taken promptly before a magistrate as required by law," citing six statutes). The one relevant statute considered by the court below, upon which the jury was instructed, was Indiana Code, Section 35-4-1-1, which requires that "any arrested and detained person" be taken "forthwith" before a magistrate or other judicial officer for a preliminary hearing whenever the arrestee offers an explanation, justification, alibi, or excuse, or ambiguous circumstances surround the arrest. Among other things that made this statute applicable was Grooms's offer to take a polygraph test, of which Snyder and Petgen were fully aware. (Tr. 71.) The jury reasonably found this fact sufficient. Nevertheless, the court below held that Section 35-4-1-1 was inapplicable because "[t]he evidence in this record of plaintiff's claiming such an alibi or such circumstances is not compelling." (App. 10.) This not only applies the wrong standard for appellate review of jury verdicts, but is itself erroneous.*/

Thus, even if Snyder and Petgen acted in subjective good faith -- which they did not, see pp. 12-14, infra -- the Court of Appeals erred in holding that, as a

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*/ The majority also overlooked defendants' violation of Indiana Code, Section 35-1-21-1, which provides, in relevant part:

> "All...police officers...may arrest and detain any person found violating any law of this state, until a legal warrant can be obtained."

The Indiana Supreme Court has held that a 68-hour detention after a warrantless arrest is "unquestionably unlawful" under this statute. Williams v. State, 348 N.E.2d 623, 627 (1976). The majority also considered Indiana Code, Section 18-1-11-8, which requires that a defendant be given a preliminary hearing within 24 hours of his arrest. This section of the Indiana Code was concededly inapplicable in this case because it applies only to City policemen.

matter of law, they acted in objective good faith. Defendants' violation of Grooms's constitutional rights cannot be justified by their "ignorance or disregard of settled, indisputable law." Wood v. Strickland, 420 U.S. 308, 321 (1975). The decision below permits precisely that result.

III.

THE AVAILABILITY OF GOOD FAITH IMMUNITY, UNDER A SUBJECTIVE TEST, IS A QUESTION OF FACT UPON WHICH DEFENDANTS HAVE THE BURDEN OF PROOF, AND THE COURT OF APPEALS ERRED BY SUBSTITUTING ITS JUDGMENT FOR THE VERDICT OF THE JURY.

In addition to misapprehending the magnitude and significance, under the objective test of good faith, of Snyder's and Petgen's violations of Indiana law, the Seventh Circuit set aside the jury verdicts because it did not agree with the jury's finding of fact. Among other things, the majority "found" that defendants acted in subjective good faith because they were merely following customary police procedures. (App. 10.) These findings, in addition to being erroneous, misperceive the factual nature of the good faith defense and set a dangerous precedent regarding the proper role of an appellate court in reviewing jury verdicts.

A defendant asserting qualified immunity must allege good faith as an affirmative defense, Gomez v. Toledo, 100 S.Ct. 1920, 1924 (1980), and he bears the burden of proving good faith to the trier of fact. See, e.g., McCray v. Burrell, 516 F.2d 357, 370 (4th Cir. 1975) (in banc), cert. dismissed, 426 U.S. 471 (1976). Whether a police officer is entitled to good faith immunity is a jury question which "depends upon the circumstances and motivations of his actions, as established by the evidence at trial." Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976). See also Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974).

At trial, the jury rejected defendants' good faith defense, and awarded Grooms, a convicted prisoner proceeding without counsel, compensatory and punitive damages against each of the police officers. In nullifying the jury verdict, the panel majority failed to apprehend fully the factual nature of the good faith defense, and improperly substituted its judgment for the findings of the jury.

The factual basis for the majority's holding was defendants' purported reliance on the customary procedures, then existing in Elkhart County, for the provision of preliminary hearings. Grooms presented more than sufficient evidence, however, to support the jury's opposite conclusion. First, defendants did not take Grooms to court on the Thursday following his Monday arrest, as defendant Petgen testified was the normal practice. (Tr. 78.) Second, defendants had Grooms booked as "John Doe," and then held him incommunicado for two and one-half days, despite Grooms's repeated requests to make a telephone call and to have counsel appointed to represent him. (Tr. 187-91.) Both of these acts were contrary to the normal practice in Elkhart County. (Tr. 144-47.)

The court below failed to recognize that defendants' assertions of subjective good faith presented questions of fact which the jury resolved in favor of Grooms, and against defendants.*/ Because there was "an evidentiary basis for that verdict, it was error for [the Seventh Circuit majority] to reevaluate the conflicting evidence and mandate a result opposite from that reached by the jury." Basham v.

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*/ The majority further misapprehended the factual nature of the subjective good faith defense by (1) overlooking the jury's award of punitive damages against each defendant, for which the jury was required to find that defendants acted with reckless disregard for Grooms' rights (Tr. 315-16); and (2) resolving issues of witness credibility in favor of defendants, despite conflicting evidence supporting the jury verdict. (E.g., App. 10, 11-12.)

Pennsylvania R.R., 372 U.S. 699, 700 (1963). As Judge Cudahy correctly observed in dissent, "this sort of case is precisely why we have juries." (App. 13.)

IV.

THIS CASE PRESENTS IMPORTANT ISSUES ON THE VIABILITY OF PRIVATE ACTIONS TO REDRESS FOURTH AMENDMENT AND OTHER CONSTITUTIONAL VIOLATIONS.

The decision below unjustifiably enlarges the scope of the qualified and absolute immunities available in Section 1983 actions, resulting in a corresponding restriction in Section 1983's protection of constitutional rights. The imposition of these immunites, in cases in which the policy reasons underlying them are absent, will leave litigants without redress for the violation of their constitutional rights.

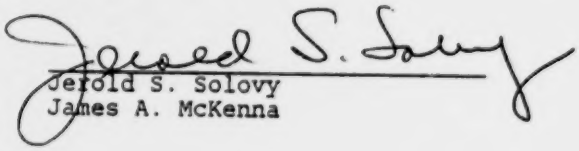
The Seventh Circuit's restriction of Section 1983 denies the pro se plaintiff, Robert Grooms, all redress for defendants' violation of his Fourth Amendment rights. Moreover, the decision below comes at a time when the traditional remedy for Fourth Amendment violations, the exclusionary rule, has been strongly criticized, see, e.g., Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 411-27 (1971) (Burger, C.J., dissenting), and increasingly narrowed. See, e.g., Stone v. Powell, 428 U.S. 465 (1976). If private actions under Section 1983 are to be a viable remedy for Fourth Amendment violations, either as a supplement or an alternative to the exclusionary rule, the judicially fashioned immunities must be granted to defendants for their unconstitutional acts only where necessary

to promote the policies underlying the immunity. Those policies are absent in this case. The important issues raised in this petition merit review by this Court.

CONCLUSION

For all of the reasons stated herein, petitioner Robert M. Grooms respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,



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December 19, 1980

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

September 30, 1980.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. WILLIAM J. JAMESON, Senior District Judge*

ROBERT M. GROOMS,
Plaintiff-Appellant,

No. 79-1453 vs.

C. WHITNEY SLABAUGH and
MICHAEL A. COSENTINO,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
No. S 76-131
Allen Sharp, Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiff-appellant, Robert M. Grooms, a vote of the active members of the Court was requested, and a majority** of the active members of the Court have voted to deny a rehearing en banc. A majority of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable William J. Jameson, Senior District Judge of the District of Montana, is sitting by designation.

** Chief Judge Fairchild and Judges Swygert and Cudahy voted to grant the petition for rehearing en banc.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
Argued April 10, 1980

August 6, 1980.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. WILLIAM J. JAMESON, Senior District Judge*

No. 79-1453
ROBERT M. GROOMS, Plaintiff-Appellant,
v.
C. WHITNEY SLABAUGH and MICHAEL A. COSENTINO, Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Indiana, South Bend Division.

Nos. 79-1536, 79-1537
ROBERT GROOMS, Plaintiff-Appellee,
v.
DAVID PETGEN and R. TERRY SNYDER, Defendants-Appellants.

No. S 76-131
Hon. Allen Sharp, Judge.

Order

This civil rights damage action was brought under 42 U.S.C. § 1983 and comprises three appeals consolidated for purposes of oral argument and decision, involving the events surrounding the warrantless arrest and improper detention of Robert M. Grooms during an investigation into a 1974 homicide and an armed robbery in Elkhart County, Indiana. Plaintiff Grooms originally filed his pro se complaint in July 1976, alleging violations of his rights under the Fourth and Fourteenth Amendments by defendants C. Whitney Slabaugh and Michael A. Cosentino, respectively the Elkhart County Prosecuting Attorney and his Chief Deputy, R. Terry Snyder, detective commander of the Elkhart County Police Department, and David Petgen and Thomas P. Malone, members of the Indiana State Police Department. In September 1976, the district court granted a

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motion to dismiss defendants Slabaugh and Cosentino on the ground that, under Imbler v. Pachtman, 424 U.S. 409, they had absolute immunity from a civil suit for damages.[1/] Discovery and various pretrial proceedings continued against the remaining defendants.

In April 1978, upon leave of court, plaintiff filed an amended complaint against defendants Slabaugh, Cosentino, Snyder and Petgen,[2/] whereupon Judge Sharp again granted a motion to dismiss Slabaugh and Cosentino. Plaintiff appeals from that dismissal in No. 79-1453. The claims against Snyder and Petgen proceeded to trial, where plaintiff, whose request for appointed counsel was refused by the district court, was assisted by a lay advisor. The three-day trial resulted in a jury verdict for plaintiff against defendant Snyder of $7,500, consisting of $2,500 in compensatory and $5,000 in punitive damages, and against defendant Petgen of $3,750, consisting of $1,250 compensatory and $2,500 punitive damages. After Judge Sharp denied defendants' post-trial motions, defendants filed their appeals in Nos. 79-1536 and 79-1537. We now affirm the dismissals in No. 79-1453 involving Slabaugh and Cosentino and reverse the judgments in No. 79-1536 involving Petgen and No. 79-1537 involving Snyder.

There is very little dispute about the relevant facts. Acting without a warrant,[3/] defendants Snyder and Petgen arrested plaintiff on December 2, 1974, in the course of their investigation into both a homicide and an armed robbery that had occurred in Elkhart County, Indiana, during the previous two days. On the evening of the arrest, defendant Petgen issued an order to impound and search a pickup truck plaintiff had claimed as his own. Petgen apparently believed that the homicide victim had been with plaintiff in the truck, which a routine registration check disclosed was actually registered to another person. As a result of Petgen's order, but without a warrant, State Trooper Malone conducted a full investigatory search of the vehicle.

1/ The record indicates that plaintiff filed a notice of appeal related to the decision to dismiss these defendants (Record Item 15). The record does not indicate the fate of this appeal.

2/ The amended complaint did not list Malone as a defendant, describing him instead as the "agent" of defendants Snyder and Petgen.

3/ At trial, defendant Petgen specifically testified that he believed he had probable cause for the arrest (Tr. 41), and plaintiff agreed that he did not seek to make the question of probable cause one of the issues in the case (Tr. 206).

Following his arrest, plaintiff was taken to the Elkhart County jail in Goshen, Indiana. The local authorities meanwhile continued their investigation, which according to plaintiff's complaint was joined by defendants Slabaugh and Cosentino.4/ Plaintiff remained incarcerated during the investigation and did not receive a hearing on his December 2 arrest before any judicial officer until December 12. The delay apparently stemmed from a combination of the practice prevailing in Elkhart County courts in 1974 and some circumstances specific to plaintiff's case. During this period the Elkhart courts held hearings to consider felony matters only once a week, on Thursdays. Plaintiff was arrested on a Monday. In felony cases not involving first degree murder, the usual procedure was for the prosecutor to file an information and probable cause affidavit, which served to initiate the criminal process and bring the matter before a court. Similarly, in first degree murder cases, no judge or magistrate would see the person to be charged until after the prosecutor had requested a judge to impanel a grand jury and the grand jury had met and returned an indictment, often a matter of a few days.

In plaintiff's case, plea bargain discussions carried on between a local attorney, who represented himself as acting on plaintiff's behalf,5/ and Elkhart County prosecutors slowed this cumbersome process even further. During these discussions plaintiff apparently agreed to a polygraph examination, which was arranged for December 5, the Thursday following plaintiff's arrest, in Chicago. Plaintiff's attendance at the examination made him unavailable for the first Thursday court-sitting following his arrest. After the examination, plaintiff was returned to the Elkhart jail and a grand jury was subsequently impanelled on December 11. After being indicted on a charge of

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4/ Since the district court dismissed the claims against Slabaugh and Cosentino under Rule 12(b)(6) of the Federal Rules of Civil Procedure, we must on appeal accept as true the well-pleaded allegations regarding these defendants.

5/ Plaintiff stated at trial and has continued to intimate in his brief that he did not authorize this attorney to represent him until well after December 2 and was in fact unaware of the attorney's initial efforts. At trial, however, plaintiff acknowledged that in an affidavit he had signed in the criminal proceedings, he described the attorney as having represented him from the evening of December 2, when he was arrested (Tr. 203-204). Since nothing ultimately turns upon this issue, we do not resolve the dispute.

first degree murder,6/ plaintiff appeared on the next day, Thursday, December 12, before an Elkhart County judge for the first time. Plaintiff was later tried and convicted of first degree murder.

Plaintiff subsequently filed his pro se complaint charging that all four defendants had violated his Fourth Amendment rights by keeping him incarcerated for 10 days without a probable cause hearing and that Snyder and Petgen were similarly liable for searching his pickup truck without a warrant. Defendants Slabaugh and Cosentino immediately moved to be dismissed from the original complaint, asserting that, as prosecutors they enjoyed an absolute immunity under Imbler v. Pachtman, 424 U.S. 409, for their alleged conduct. As noted, the district court judge granted both this motion and a similar motion filed in response to the amended complaint. The case went to trial against Snyder and Petgen on charges that they violated plaintiff's rights under Gerstein v. Pugh, 420 U.S. 103, which holds that under the Constitution, a person arrested upon a prosecutor's information may not be detained before trial without a determination of probable cause by an impartial judicial officer. At their jury trial, defendants Snyder and Petgen argued that they had relied in good faith on the local Elkhart procedures, that plaintiff had waived a prompt preliminary hearing and that plaintiff had suffered no damage. The jury nevertheless returned a verdict for the plaintiff. Although expressing sympathy with defendants' post-trial motions for a judgment notwithstanding the verdict and a new trial, Judge Sharp denied them and entered judgment for plaintiff.

Prosecutorial Immunity of Slabaugh and Cosentino

Plaintiff's argument on appeal that defendants prosecutor Slabaugh and chief deputy prosecutor Cosentino are not entitled to prosecutorial immunity depends primarily on his allegation that these defendants participated in the investigation into the crimes of which plaintiff was suspected. He insists that

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6/ The record does not clearly indicate what became of the prosecutor's suspicions that plaintiff was involved in the armed robbery, though the early discussions between plaintiff's counsel and the prosecutors as well as plaintiff's decision to take the polygraph test apparently revolved around these charges. Defendants have in fact argued that plaintiff sought immunity for his role in the armed robbery in return for testimony regarding the homicide in which he said he was not involved.

by joining the investigation Slabaugh and Cosentino forfeited their immunity under Imbler v. Pachtman, since that case specifically states that prosecutorial immunity may not reach to the administrative or investigative acts of this judicial officer (424 U.S. at 430-431). Defendants on the other hand rely on language in Imbler drawing beneath the umbrella of prosecutorial immunity decisions on "initiating prosecutions" and maintain that the pre-hearing delay here represented part of such a decision.

Neither of these approaches is particularly faithful to the Supreme Court's decision in Imbler, which undertook a careful delineation of prosecutorial functions and calls for an informed assessment of the particular activities involved in each case. For example, even under the looser standards of Haines v. Kerner, 404 U.S. 519, plaintiff's pro se amended complaint alleges simply that defendants Slabaugh and Cosentino were active in the criminal investigation pending the holding of the probable cause hearing. Assuming, as we must, that this allegation is true, their participation in the investigation does not necessarily take them outside the protection of Imbler. Indeed, that case indicates that a prosecutor's regular duties will include some investigative tasks. 424 U.S. at 431 n.33; see also Atkins v. Lanning, 556 F.2d 485, 488 (10th Cir. 1977). Defendants' position that they were acting as prosecutors because the delay occurred at the time they were undertaking the decision to charge or because the hearing accompanied the formal initiation process is equally untenable. By a similar logic, a prosecutor might be immune from subsequent litigation for every action he takes before charging a suspect, a result not only not anticipated by Imbler but directly contrary to its intent.

Nevertheless, defendants have the better of the argument in this case. Even under liberal pro se pleading rules, plaintiff must give defendants some idea of the acts that have deprived them of their traditional immunity. Far from serving this function, plaintiff's allegation that defendants participated in an investigation while keeping him confined fails to suggest more than that these prosecutors were engaged in such appropriate activities as assembling evidence, inquiring into potentially exculpatory material, selecting the appropriate charges, offering a plea bargain, and preparing the case for presentation to a grand jury. Plaintiff's amended complaint is devoid of any suggestion that, for example, defendants' investigatory acts were comparable to those of "arresting officers," or even that these acts harmed him or that the detention served a distinct, investigatory purpose rather than a purpose connected to their prosecutorial role. Nor has plaintiff clearly outlined on appeal how the amended complaint

can be so construed. In the Imbler context, at least some hint of such activity is essential since permitting plaintiff to proceed on a speculative or faulty pleading can result in much of the damage to prosecutorial independence that an absolute immunity is designed to prevent.

Plaintiff asserts, however, that the scheduling of a probable cause hearing is a mere administrative task expressly excluded from the Imbler grant of immunity for prosecutorial activity. Like the argument about defendants' investigatory activity, this assertion belittles the sophisticated evaluation of prosecutorial functions that Imbler demands. A prosecutor is called upon to make many administrative decisions in the course of his prosecutorial duties. These decisions, the timing and character of which will be directly linked to the more highly discretionary prosecutorial tasks, are no less prosecutorial for being more narrowly circumscribed. Such tasks are simply inextricably intertwined with the traditional elements of a prosecutor's job. They resemble in name only those collateral decisions a prosecutor may make in the course of managing his staff and office, decisions that may result in constitutional violations while being associated with prosecutorial activity solely because of the purely coincidental nature of the office involved.7/

Gerstein v. Pugh, 420 U.S. 103, decided in 1975, may have altered the relationship between the decision to hold a probable cause hearing and the other decisions incident to a prosecutor's duties, but we decline to permit Gerstein to obscure the issue presented by this case. The thrust of the Court's decision in that case may be to sever the decision to schedule a preliminary hearing from the more discretionary decisions regarding the charges to be filed and evidence presented. But aside from leaving open the question whether the scheduling decision is as a result essentially non-prosecutorial, the Gerstein result simply comes too late to affect the disposition of a case based on these 1974 events. It is essential to consider the decisions at issue here as they were understood at the time they were made, and until Gerstein the decision to keep a suspect confined was regarded in many

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7/ As an example of what the Imbler Court had in mind, a prosecutor might fire an employee without due process or discriminate against minorities in hiring decisions. These administrative acts would not be protected under Imbler, even though the person responsible for them was a prosecutor, because they are the acts of an administrator, not a prosecutor qua prosecutor.

areas, including Elkhart County, as a decision for the prosecutors to make. In slightly different terms, the observation that Gerstein subsequently made it improper to delay a probable cause hearing to accommodate prosecutorial decision-making cannot substitute for a proper allegation that, at the time it was made, the decision not to hold the hearing represented some independent administrative irregularity rather than some element of prosecutorial discretion. Since such an allegation was lacking, the district court properly dismissed defendants Slabaugh and Cosentino from this case.

Good Faith Defense of Petgen and Snyder

At trial and in their post-trial motions, defendant police Petgen and Snyder vigorously argued that they were entitled to a good faith defense against plaintiff's claim that they denied him his right to a probable cause hearing. In ruling on the post-trial motions, Judge Sharp found considerable evidence that defendants acted in good faith as a matter of law under such cases as Pierson v. Ray, 386 U.S. 547, and Wood v. Strickland, 420 U.S. 308, but deferred to the judgment of the jury. In outlining the "good faith" defense to a § 1983 action the Supreme Court in Pierson stated simply that "a police officer is not charged with predicting the future course of constitutional law." 386 U.S. at 557. Elaborating on this principle, Wood v. Strickland, 420 U.S. 308, explained that a § 1983 defendant could be liable only if he acted upon an "impermissible motivation or with such disregard of *** clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." 420 U.S. at 322. A crucial element of defendants' defense in this case is therefore that Gerstein v. Pugh, which was decided after the events in question, established rights not previously clear to defendants and police officers generally. It is worth noting that this evaluation of Gerstein's place in the development of constitutional law appears to present only a question of law so that Judge Sharp's deference to the jury was probably unwarranted.[8/]

8/ We do not mean to imply that all aspects of the good faith defense represent questions of law. There remain the factual issues, noted infra, whether, for example, defendants actually relied on the apparent constitutionality of the Elkhart procedures or were motivated by some other consideration.

Plaintiff attempts to minimize the developmental significance of Gerstein by noting that the right to have an impartial judicial officer evaluate the evidence supplying probable cause before a suspect suffers any loss of liberty is a venerable principle rooted in the English common law and clearly expressed in the Bill of Rights. Although we respect the pedigree of plaintiff's principle, we cannot agree that its application to this situation was clear. The context in which Gerstein was decided belies the suggestion that these defendants should have known that plaintiff could not be confined upon action of the prosecutors but only upon a decision of a magistrate. Indeed, the Florida practice disapproved by the Court in Gerstein was similar to that prevailing in Elkhart County, so that the actions of these defendants had some authority outside the local context. Furthermore the Court in Gerstein explicitly acknowledged its previous decisions and those of the Fifth Circuit holding that such pre-hearing detention does not supply grounds for overturning a subsequent conviction. That the Court ultimately chose to distinguish these cases in requiring review by a magistrate rather than a prosecutor does not mean that defendants should have known that their conduct was constitutionally unacceptable. Rather, subjecting them to liability would require them to make just the sort of prediction about the course of constitutional law the "good faith defense" is designed to make unnecessary.

Plaintiff argues nonetheless that defendant's conduct was in conflict with two Indiana statutes directing an immediate hearing,[9/] that defendants admitted they were aware of the two statutes and that, even if these statutes did not provide clear evidence of the unconstitutionality of defendants' conduct, they at least demonstrated that defendants' actions were not in good faith. For this argument regarding good faith to be more than a mere play on words, it must refer to the character of defendants' motives at the time of the events in question. That is, since such state statutes cannot show the

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9/ Indiana Code Section 35-4-1-1 provides for the filing of a preliminary charge and for the accused to be taken "forthwith" before a magistrate for a hearing on that charge if the person arrested offers "any explanation, justification, alibi or excuse, or circumstances exist which might or could negative the presence at or participation in" the crime charged. Indiana Code Section 18-1-11-8, which appears in the statutes related to city affairs, requires the police to provide suspects with a preliminary hearing within twenty-four hours of arrest. Judge Sharp included the text of both statutes as well as a definition of "forthwith" within his instructions to the jury.

existence of a clear constitutional right, plaintiff's argument must be that defendants were not relying upon the procedures customary in Elkhart County courts but were rather acting in flagrant disregard of the directives of these statutes.

There are two related difficulties with plaintiff's argument. First, since even plaintiff admits that the procedures in Elkhart County were approximately as defendants described them, it strains credulity to conclude that defendants were acting without reference to them. The procedures were simply too much a part of defendants' routine for them to have been not a part of their motivation. Second, in contrast to the clear applicability of these procedures, the possibility that the officers were intentionally flouting the state statutes was small. Defendants repeatedly argued at trial that these statutes were not applicable to them. One, they note, refers only to city police officers whereas Petgen was a state trooper and Snyder a county detective. The Indiana Court of Appeals has recently held this statute inapplicable to these officers. Grooms v. Fervida, 396 N.E.2d 405 (Ind. App. 1977). The second applies only when the person arrested claims an explanation, justification, alibi, or excuse or ambiguous circumstances surround the arrest. The evidence in this record of plaintiff's claiming such an alibi or of such circumstances is not compelling, especially in the case of the armed robbery charge. It is difficult to understand how these defendants could be found to have acted in bad faith based on defiance of statutes that they reasonably thought did not apply to them.

These difficulties with plaintiff's argument regarding the relevance of the Indiana statutes to defendants' good faith are so severe that the jury could have found liability on defendants' part only out of confusion about the significance of the statutes. Indeed, even a cursory reading of the instructions demonstrates that they were insufficiently clear to restrict the jury's consideration of the statutes to the issue of good faith. However, the deficiencies in the instructions do not require a new trial on this question. The evidence that defendants believed these statutes were applicable and acted in direct contravention of them was speculative, whereas the evidence that they acted in reliance on local procedures was overwhelming. We agree with the trial judge that these police officers should not "be held to predict the course of constitutional law as announced in Gerstein," (R. Item 103 p.2). Therefore, we find as a matter of law that defendants did not have an improper motivation in holding plaintiff and that they acted in good faith. Under Pierson v. Ray and Wood v. Strickland, both supra, the police officers were entitled to judgment n.o.v. on claim one.

Search of Plaintiff's Truck

The police officers also argue that they are not liable for any constitutional infirmities in the search of plaintiff's truck. They note that the truck was impounded after a registration check contradicted plaintiff's claim of ownership and that their order to impound the truck and to conduct an inventory search of the vehicle was therefore proper under South Dakota v. Opperman, 428 U.S. 364. Defendants specifically deny that they ordered anything beyond the constitutionally permissible inventory and conclude that they were not responsible for any violations of plaintiff's constitutional rights.

Trooper Malone, who conducted the search of plaintiff's truck, admitted at trial that he conducted an investigative search of the truck rather than an inventory search (Tr. 55). That kind of search is clearly beyond the scope of the Opperman rule. Less clear is why Malone acted in this manner. To prove his case, plaintiff had to show that Petgen and Snyder were in some way connected with the search, either by ordering it directly or knowingly permitting it to proceed. The record provides very little help in this regard. Perhaps because he has partly misapprehended defendants' arguments[10/] plaintiff has referred this Court to only two excerpts from the trial transcript, both from the testimony of defendant Petgen, regarding defendants' role in the search. Neither supplies the necessary link between defendants' order and the investigative element of the search. In the first, Petgen explained his reasons for ordering the impoundment and search. These included the irregular registration, evidence linking the truck to the crimes under investigation and the damaged condition of the vehicle (Tr. 64-65). In the second, Petgen described the mechanics of how he ordered the impoundment and search. There he specifically testified that he requested an "inventory search" of the truck (Tr. 72-74). In addition to these snippets, our review of the transcript discloses a third item

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10/ Plaintiff apparently construes some of defendants' statements about the search as a denial of any connection with it (Br. 13). Defendant Snyder has suggested that he had little or nothing to do with the search, but in light of the trial testimony that he and Petgen made all investigatory decisions together (Tr. 74), his argument is not particularly persuasive, and he has not pressed it here. Rather the crux of both defendants' argument seems to be that whatever their connection with the search of the truck, they were not responsible for Malone's decision to go beyond an inventory search to conduct an investigative search.

bearing on the issue in the testimony of Trooper Malone. He reported that the police post Petgen had contacted in ordering the search advised Malone to "process" the vehicle and that Malone had contact with Petgen only after the search of the truck was completed (Tr. 51).

It is of course possible that the order Petgen actually gave, which was subsequently relayed to Malone, requested a full search of the vehicle. It is also possible that Petgen failed to indicate the necessary restrictions on the kind of search he wanted. The difficulty is that the record offers no support for this conclusion, which plaintiff had the burden of demonstrating. On the contrary, Petgen testified without contradiction that he ordered an "inventory" search. Malone testified that his orders were simply to "process" the vehicle and that he received no other instructions directly from Petgen. This evidence uniformly supports defendants' view of the case so that the jury's verdict on this claim must be set aside.[11/]

No. 79-1453 affirmed; Nos. 79-1536 and 79-1537 reversed.

11/ In Opperman, supra, the Court noted that the case contained no suggestion that the standard inventory procedure followed by the police in that case "was a pretext concealing an investigatory police motive." 428 U.S. at 376. We do not share plaintiff's view (Br. 13, n.2) that this comment clearly indicates that if the police were acting from impure motives, the search would have been improper even if it were well within the limits of the usual inventory search. The character of the motives of the police does not ordinarily affect the owner's expectation of privacy. Therefore, although some of the evidence suggested that Petgen acted from mixed motives, those motives would not have vitiated an otherwise proper order for an inventory search.

CUDAHY, Circuit Judge, Dissenting.

The majority labors long and ingeniously, through a captious focus on a pro se complaint, to allow the wall of immunity around the supervising prosecutors to stand. Equity among defendants is then achieved by throwing out the jury verdict against those closer to the line of fire. Meanwhile, the pro se plaintiff, who among other things, was jailed without a probable cause hearing for ten days, is denied any remedy.

I perceive nothing in Imbler v. Pachtman, 424 U.S. 409 (1976) which even remotely suggests that absolute immunity for prosecutors would be unavailable only in such matters as hiring and firing decisions (as the majority suggests). Imbler sharply distinguished and left open the whole subject of prosecutors as "investigative officer[s]," 424 U.S. 430-31. It is difficult for me to see why a prosecutor is acting as an "advocate for the State" or "an officer of the court" (424 U.S. 430 n. 33) when he defers a probable cause hearing for ten days. See Shifrin v. Wilson, 412 F. Supp. 1282, 1303-04 (D.D.C. 1976).

I feel less strongly about the police officers, who in fundamental matters may only have been following instructions. But this sort of case is precisely why we have juries -- as apparently Judge Sharp perceived.

I respectfully dissent.

MEMORANDUM AND ORDER

Plaintiff alleges for his claim against the defendant, C. Whitney Slabaugh and Michael A. Consentino, that from December 2, 1974 through December 12, 1974, while the defendants were acting in their respective capacities as prosecuting attorney of Elkhart County, Indiana and chief deputy prosecuting attorney of Elkhart County, Indiana, the defendants were aware of the plaintiff's warrantless arrest and detention and made no effort to have him brought before a magistrate or to obtain a judicial warrant for his arrest. The plaintiff also alleges that the defendants directed a criminal investigation into offenses in which the plaintiff was a suspect.

The essence of the plaintiff's claim in is that the defendants violated his constitutional rights by failing to take the plaintiff before a magistrate until nine days after his arrest. The plaintiff alleges that the defendants were conducting an investigation into his activities during this period of incarceration.

The question squarely confronting the Court in this case is whether such allegations are sufficient to withstand a motion to dismiss. Clearly, they are insufficient if they allege no more than wrongdoing of the defendants Slabaugh and Cosentino while engaged in their functions as judicial officers. However, if these allegations are sufficient to allege wrongdoing in their capacities as investigators, the defendants may have only a good-faith defense. Hampton v. City of Chicago, 484 F.2d 602, 608-609 (7th Cir. 1973), cert. denied, 415 U.S. 917, 39 L.Ed. 2d 471, 94 S.Ct. 1413.

The Supreme Court of the United States has held that in initiating a prosecution and in presenting the state's case, the prosecutor is absolutely immune from civil suit for damages under 42 USC §1983. Imbler v. Pachtman, ___U.S.___, 47 L.Ed. 2d 182, 96 S.Ct. 984 (1976). The issue confronting the court in this case is whether the plaintiff has alleged in his complaint

any acts or omissions by the defendants which were not "intimately associated with the judicial phase of the criminal process" and thus were not entitled to the absolute immunity applicable in Imbler, supra.

While Imbler v. Pachtman involved the procurring of false testimony and the supression of evidence by a prosecutor, other courts have been called upon to consider whether acts or omissions of the prosecutor prior to trial have changed the nature of the prosecutor's function to resemble that of a police officer so as to deprive him of the immunity expressed in Imbler. One such case is Atkins v. Lanning, 566 F.2d 485 (10th Cir. 1977). In that case, the plaintiff was arrested under a warrant valid on its face, but which mistakingly named the plaintiff as the person to be arrested. The plaintiff spent 33 days, either in jail or in the state mental hospital, before the mistake was discovered at his preliminary hearing. For his wrongful arrest and imprisonment, the plaintiff brought an action against the district attorney, and an investigator, an undercover agent employed by him. The Court of Appeals for the 10th Circuit rejected the plaintiff's argument that under these facts the nature of the prosecutor's function resembled more than that of a police officer than that of an advocate so as to deprive him of immunity.

> "While it is true that some investigative work is necessarily a pre-requisite to the preparation of a prosecuting attorney's case, this does not automatically change the nature of his function to resemble that of a police officer. In the case at bar, the district attorney did not act as any type of 'arresting officer.' Weathers, supra. Case law indicates that the denial of immunity to a state prosecutor would doubtless require a gross abuse of the prosecutorial function, such as deliberately concealing evidence proving a defendant's innocence." 556 F.2d 485, at 488.

On these grounds, the Court of Appeals upheld the lower court's grant of summary judgment in the defendant's favor.

In considering whether a prosecutor has engaged in an investigative or judicial role, several courts have drawn the line in favor of the prosecutor's judicial functions where he has failed to initiate judicial proceedings, causing a denial of plaintiff's sixth amendment right to a speedy trial. In Prince v. Wallace, 568 F.2d 1178 (5th Cir. 1978), the plaintiff brought an action against the state governor, the state attorney general, and the county district attorney to recover under 42 USC §1983 for deprivation of his constitutional right to a speedy trial and his right to be free from cruel and unusual punishment. The Court of Appeals for the Fifth Circuit in a per curiam opinion, set out the district court's final judgment, and did not specify the acts of the defendants complained of by the plaintiff. The Court of Appeals held that the county district attorney and the state attorney general had absolute prosecutorial immunity for any actions taken within the scope of their duties allegedly denying the plaintiff his constitutional right to a speedy trial and his constitutional right to be free from cruel and unusual punishment. The granting of the defendants' motion to dismiss and motion for summary judgment was affirmed.

The Eighth Circuit came to the same conclusion earlier this year in Ledwith v. Douglas, 568 F.2d 117 (8th Cir. 1978). In that case, the plaintiffs were sued by the state under the Nebraska Uniform Deceptive Trade Practices Act to enjoin alleged unfair trade practices of the plaintiffs. The injunction was issued and subsequently the plaintiffs initiated a suit against the state prosecutor, on the grounds that the plaintiff had been libelled in the action below, and had been denied a speedy trial in violation of the Sixth Amendment. The Court of Appeals held on these facts that plaintiff's complaint failed to state a cause of action in that the doctrine of prosecutorial immunity enunciated in Imbler v. Pachtman barred the claim for damages for libel and denial of a speedy trial.

The reasoning and result reached here are well supported by Heidelberg v. Hammer, [27] F. 2d [416] (7th Cir. No. 75-2052 decided June 8, 1978).

In light of the above authorities, it is apparent that even the willful failure to initiate a specific stage of the judicial process alleged to have denied the plaintiff's constitutional rights is a judicial function of the prosecutor and entitled to absolute immunity. Even though some investigatory work is necessary in order to prepare the prosecutor's case this does not remove the cloak of immunity granted the prosecutor against an action for damages arising under the Civil Rights Acts.

The plaintiff's complaint alleges that his constitutional rights were violated by a failure to comply with the timetable established by Indiana statute for bringing apprehended criminal suspects before a magistrate. The Eighth and Fifth Circuits have ruled that a prosecutor is absolutely immune from an action for damages based on the Civil Rights Acts, which alleges a prosecutorial failure to bring the plaintiff to trial within the time limits established by the U.S. Constitution.

These authorities compel the conclusion that the plaintiff has failed to state a claim upon which relief can be granted. This action is now DISMISSED as to defendants, C. Whitney Slabaugh and Michael A. Cosentino.

Enter July 21, 1978.

Allen Sharp

JUDGE, UNITED STATES DISTRICT COURT.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

FILED
APR 18 1979
RICHARD E. TIMMONS, CLERK
U.S. DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

ROBERT M. GROOMS

Plaintiff

v.

R. TERRY SNYDER,
DAVID PETGEN

Defendants

No. S 76-131

ORDER

The verdicts of the jury against both defendants for both compensatory and punitive damages are now vigorously challenged by post-trial motions. This Court is caught between several values that are in apparent conflict.

First, the Court has the strong feeling that the jury reached the wrong result. If this case were being tried under both Indiana substantive law and procedure, this Court would have the authority under the 13th juror concept to set aside the verdict as being against the weight of the evidence. See Bailey v. Kain, 135 Ind. App. 657, 192 N.E. 2d 486 (1963). See also, Moore v. Berry Refining Co., 145 Ind. App. 92, 248 N.E. 2d 398 (1969).

No such authority exists under Federal Procedure. See Johnson v. B & O, 65 F.R.D. 664 (D.C. Ind. 1974), affirmed 528 F. 2d 1313, and Karczewski v. Ford Motor Co., 382 F. Supp. 1346 (D.C. Ind. 1974), affimed 515 F. 2d 511, and the authorities therein cited. Therefore, this Judge cannot make the analysis of the evidence that Judge Hunter suggested at 135 Ind. App. 657, 192 N.E. 2d 486.

Secondly, this Judge has the rather strong feeling, supportable by the record, that he bent over too far in favor of the plaintiff and may have unintentionally but subtlely deprived the defendants of a fair trial in the process. It is a very normal human instinct to lean backwords in favor of pro se parties. Such may happen without any express intent to do so. It may have happened here.

193.

Thirdly, there is strong evidence to support a finding of good faith as a matter of law under Pierson v. Ray, 386 U.S. 587 (1967); Scheurer v. Rhodes, 416 U.S. 232 (1974); Wood v. Strickland, 386 U.S. 308 (1975); and Procunier v. Navarette, ____ U.S. ____, 98 S. Ct. 855 (1978).

The events in this case took place in the first two weeks of December 1974. Dommer v. Hatcher, 427 F. Supp. 1040 (N.D. Ind. 1975), was decided by this Court on July 25, 1975, with a supplemental order on March 7, 1977. Gerstein v. Pugh, 420 U.S. 103 (1975), was decided by the Supreme Court of the United States on February 18, 1975. It was those two cases that caused the courts of Indiana to revise practices and procedures in regard to the preliminaries of the criminal process. Both were decided well after the events in this case. It is most difficult to see how these defendant police officers can be held to predict the course of constitutional law as announced in Gerstein v. Pugh and Dommer v. Hatcher. The comment of Chief Justice Warren in Pierson v. Ray is directly on point.

Fourth, this Court has the most serious doubts as to whether more than one dollar of the verdicts should be permitted to stand under the authority of Carey v. Piphus, 98 S. Ct. 1042 (1978). This is especially true in view of the comment of the Court of Appeals for the Seventh Circuit in a related case. See McBride v. Soos and Haney, ____ F. 2d ____, (No. 77-1438 decided February 22, 1979). Given the following comment about the fact finding function of the jury, this Court cannot determine as a matter of law that these verdicts should be reduced under the authority of Carey v. Piphus.

Fifth, and last, this Court has deep respect for the values imbedded in the Seventh Amendment of the Constitution of the United States and for the fact finding authority of the jury thereunder. Notwithstanding, all of the doubts expressed above, this Court is compelled to let stand the verdicts of this jury; while doing so with the greatest reluctance. To do otherwise would violate the most fundamental precepts of the proper function of court and jury contained in the Seventh Amendment. Those values transcend the immediate controversey of this case.

This Court is therefore compelled to and now does overrule all the defendants' post-trial motions and now lets stand the jury verdicts and the judgments entered thereon.

Enter April 18, 1979.

JUDGE, UNITED STATES DISTRICT COURT.

Grooms
Ulmer
Owen
Braun